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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-904

BRUNSWICK CORPORATION,

Appellant,

vs.

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

MOTION OF PUREX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF.

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MOTION OF PUREX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF.

Comes now the Purex Corporation, a corporation, by its counsel, pursuant to Rule 42 of the Rules of this Court, and moves this Honorable Court for leave to file a brief *amicus curiae* in general support of the Respondents and relating to the first question as to which the petition for a writ of certiorari was granted.

The Purex Corporation is a corporation organized and existing under the laws of the State of California. Purex produces and sells a large number of products, including household cleaning products. One of its most significant products has been Purex Liquid Bleach. Purex is the plaintiff in an action now pending in the United States District Court for the Central District

of California in which it seeks the recovery of damages under Sections 4 and 7 of the Clayton Act, as well as under Sections 1 and 2 of the Sherman Act, for injury which it alleges resulted from the 1957 acquisition by the Procter & Gamble Company of Clorox Chemical Company. While that acquisition was challenged almost immediately by the Federal Trade Commission, it was not until a decade later, after this Court issued its Opinion holding that the acquisition did in fact violate Section 7 (*F.T.C. v. Procter & Gamble Co.* (1967), 386 U.S. 568) that P&G divested itself of Clorox. Parenthetically, it should be noted that the Federal Trade Commission and this Court found Clorox' share to be "dominant" at the time of the acquisition (Clorox had approximately forty-eight per cent of the market); by the time of divestiture, in 1969, that share had increased to almost sixty per cent. Purex alleges that its share of market was substantially reduced and, in addition, that it was prevented from expanding geographically by the massive retaliatory capacity Procter & Gamble's presence in the industry gave to Clorex.

The Purex Corporation desires to file a brief *amicus curiae* relating solely to the first issue on which the writ of certiorari was granted.[1] Purex believes that the resolution of this issue may be of broad significance, both to the economy and to the future effectiveness of Section 7 enforcement. The first issue accepted for hearing by this Court is phrased in terms of whether the mere continued presence in the industry of an entity illegally acquired by a deep pocket parent can afford a basis for the recovery of damages by an injured horizontal competitor. The Court's consider-

[1]Purex made request of the parties for consent to file an amicus brief but such consent was not given.

ation of the question will automatically and necessarily, because of the way the question is put, include the assumption that but for the acquisition, the acquired entity would not have been "present" in the industry. Thus, unless carefully delineated, the focus of the first question is clouded by the second issue upon which the writ was granted—whether the failing company principle would require a dismissal of the action. There is a distinct danger that because the two questions presented are inexorably interrelated, given the facts of the *Brunswick* case, the parties and the Court will view with a limited perspective an issue having profound economic implications. The facts presented by the case are certainly atypical in that we are aware of no other instance in which a Section 7 plaintiff has conceded that but for the acquisition, the acquired company would have been unable to remain in the marketplace. Such unique facts make it difficult to arrive at a general standard for private recovery of injuries caused by illegal acquisitions. Unless carefully considered and framed, the resulting standard might unintentionally preclude recovery by injured competitors even where the violation of Section 7 is unquestioned and where the plaintiff's claim for damages in no way depends upon the hypothetical disappearance from the marketplace of the acquired company. Purex believes that its brief *amicus curiae* will assist the Court in assessing the importance of (1) keeping strictly separate its consideration of the two questions as to which the writ of certiorari was granted, and (2) carefully considering the broad effects of its resolution of the first question presented.

Purex' brief will analyze the standard for private recovery from a broad perspective, namely, whether

a horizontal competitor of a company acquired by a deep pocket parent in violation of Section 7 can recover damages under Section 4 if it shows injury in fact causally related to the *violator's* presence in the market. Focusing on the presence of the acquiring company, rather than on whether or not the acquired company would have continued in the market, thus directs attention to a factor present in all Section 7 cases and not unique to *Brunswick*. This focus is necessary because any decision in *Brunswick*, even though specifically phrased so as to cover only the presence of the acquired company, will inevitably be extended by lower courts to other Section 7 situations. Conversely, the broader question, however resolved, would provide a standard applicable to the *Brunswick* case.

Purex is hopeful that its brief will be of assistance to the Court in considering the issues presented by the grant of a writ of certiorari. Wherefore, Purex respectfully requests leave to file its *amicus curiae* Brief in support of the judgment below.

Respectfully submitted,

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE.

Purex Corporation's concern regarding the resolution of the first issue accepted for review by this Court arises, as was detailed in the motion filed concurrently herewith, from the fact that Purex is the plaintiff in an action to recover damages for an alleged violation of Section 7 of the Clayton Act. While Purex is of the view that the facts upon which its lawsuit and claimed damages are based are entirely different from those alleged to exist in the instant case, it realizes that the decision here will undoubtedly play a major role in shaping the standard of proof to be required of all Section 7 plaintiffs. Purex and its counsel have no knowledge of the particular facts which make up the record below and take no position with regard to them. As reflected in the framing of the questions accepted for review, however, that record would seem to present a most unique factual matrix. Purex proposes to analyze the broad issues raised by the Petitioner from the perspective of a horizontal competitor of a company acquired by a deep pocket parent in violation of Section 7, but where there is no contention that the acquired company would have gone out of business but for the acquisition. Purex hopes that this Brief will assist the Court in separating out the "failing company" issue from the issue of what a private plaintiff must prove to recover damages once a violation of Section 7 is established so that these two abstract issues will be separately considered and decided.

SUMMARY OF ARGUMENT.

At the threshold, the Petitioner in this case has argued that it is incongruous to allow private damage actions for injury stemming from a violation of Section 7 of the Clayton Act. The argument of *amicus* establishes that in fact traditional principles of statutory construction require this Court to reach the conclusion that Section 7 violations, as with other violations of the antitrust laws, serve as the basis for private damage actions by injured parties. Even more importantly, such actions assist in the effective enforcement of the antitrust laws, and provide the only practical method for undoing the changes in market structure which may follow anti-competitive mergers. Such mergers typically confer upon the acquired company competitive advantages (as, for example, reciprocal dealing arrangements, deep pocket assistance, etc.) which the acquired company would not have had if no acquisition had taken place. Gains in relative market strength by the acquired company which occur thereafter are often directly caused by the advantages gained by virtue of the illegal acquisition. Unless private plaintiffs are allowed to recoup their losses attributable to such changes, it is most unlikely that the market structure will return, upon divestiture, to its pre-acquisition status. Divestiture alone does not turn back the clock nor does it unscramble the omelet created by the acquisition. Furthermore, without such private damage actions no real disincentive for the making of questionable acquisitions exists. The violator who may have reaped massive profits from an industry because of the application of deep pocket power or reciprocal dealing advantages will not ever face the prospect of disgorging his booty.

Even a forced divestiture sale will often yield a profitable return on the initial investment made.

Secondly, *amicus* discusses what it is that a private plaintiff must show in addition to a violation of Section 7 before recovery of damages will be allowed. In summary, the requirements of Section 4 set forth exactly what must be proved, and no basis exists for imposing different requirements of proof on Section 7 plaintiffs than are applicable to antitrust plaintiffs generally. Petitioner seems to argue that in addition to showing a Section 7 violation, a private plaintiff must also prove that a restraint of trade or monopoly has occurred —in effect, requiring proof of another independent antitrust violation. Most of Petitioner's argument to this effect, however, is based upon the implicit underlying assumption that the acquisition in this case was pro-competitive because the companies acquired were "failing", and thus no damage award against it would be proper. The real rationale of this argument is dependent not upon what standard should be applied for a Section 7 recovery, but rather on whether Section 7 was violated at all. When the failing company question is separated out, the correctness of the Third Circuit's decision below on the standard of recovery issue becomes apparent. As applied to horizontal competitors, changes in an industry, which would not have occurred but for an illegal acquisition, and which proximately result in foreseeable injury to competitors must be the proper basis for an action for the recovery of damages, if the marketplace is to ever approximate the situation prior to the acquisition.

ARGUMENT.

I

Competitors Actually Injured as the Result of an Illegal Acquisition Should Be Afforded the Right to Recover Their Damages.

While discussing the first issue for review by this Court, Petitioner argues extensively that no recovery should be allowed for injury stemming from a violation of Section 7 of the Clayton Act. Petitioner's position has been uniformly rejected by the lower courts, and the following discussion will demonstrate that there are strong reasons of statutory construction and social and economic policy which require that an injured competitor be given an opportunity to recover actual damages where there has been a violation of Section 7.

A. The Courts Have Uniformly Decided That Proper and Traditional Statutory Construction Requires the Conclusion That a Violation of Section 7 Can Support a Private Right of Action.

Contrary to the impression rather skillfully conveyed in Petitioner's Brief (pp. 19-24), there is no split of authority on the question of whether Section 7 supports a private right of action. There are not "a number of courts" on one side of the issue and "a number of other courts" on the other side of the issue. Every single case cited by Petitioner (Brief, p. 24) as holding that a claim under Section 4 of the Clayton Act could not be based on a violation of Section 7 has been reversed, overruled, or invali-

dated.[1] This result is compelled by the Clayton Act itself. Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." (Emphasis added). The Clayton Act (including Section 7) is obviously an "antitrust law" quite clearly encompassed within the terms of Section 4.[2]

Six of the Courts of Appeals have explicitly approved private actions for damages for violations of Section 7.[3] At least two other circuits appear willing to recognize

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[1]Specifically, *Gottesman v. General Motors Corporation* (S.D. N.Y. 1963), 221 F.Supp. 488, was reversed (2nd Cir. 1969), 414 F.2d 956; *Isidor Weinstein Investment Co. v. Hearst Corporation* (N.D.Cal. 1969), 303 F.Supp. 646, was reversed (N.D. Cal. 1970), 310 F.Supp. 390; *Highland Supply Corporation v. Reynolds Metals Company* (E.D.Mo. 1965), 245 F.Supp. 510, which implemented the Eighth Circuit's decision in the same case (8th Cir. 1964), 327 F.2d 725, was effectively reversed in *Carlson Companies, Inc. v. Sperry and Hutchinson Co.* (8th Cir. 1974), 507 F.2d 959, which held that a private cause of action is available; and *Bailey's Bakery, Ltd. v. Continental Baking Company* (D.Haw. 1964), 235 F.Supp. 705, was expressly overruled by the same judge, following extensive analysis in *Kirihara v. Bendix Corporation* (D.Haw. 1969), 306 F.Supp. 72, 88.

[2]Section 1 of the Clayton Act, 15 U.S.C.A. § 12, provides that " 'antitrust laws,' as used herein," includes the Sherman Act, certain sections of the Wilson Tariff Act, an act amending the Wilson Tariff Act, and, of course, the Clayton Act itself.

[3]*Gottesman v. General Motors Corporation* (2nd Cir. 1969), 414 F.2d 956; *NBO Industries Treadway Cos., Inc. v. Brunswick Corp.* (3rd Cir. 1975), 523 F.2d 262; *Dailey v. Quality School Plan, Inc.* (5th Cir. 1967), 380 F.2d 484; *Carlson Companies, Inc. v. Sperry and Hutchison Co.* (8th Cir. 1974), 507 F.2d 959; *Calnetics Corp. v. Volkswagen of America, Inc.* (9th Cir. 1976), CCH Trade Reg. Rep. ¶ 60,757, at 68,241-68,242, reversing a directed verdict for the defendant; *Martin-Trigona v. Federal Reserve Board* (D.C.Cir. 1975), 509 F.2d 363, 366 n. 12 (Dicta, "It is settled . . . .").

a private cause of action by a plaintiff within the "target area".[4] In addition, a large number of district court cases have recognized the propriety of a private action for a violation of Section 7.

Finally, this Court's decision in *Minnesota Mining v. N. J. Wood Co.* (1965), 381 U.S. 311, 14 L.Ed.2d 405, 85 S.Ct. 1473, lends strong inferential support to the conclusion. That action alleged the violation of Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, and was based on a challenged acquisition. This Court held that the pendency of a Federal Trade Commission divestiture proceeding tolled the Statute of Limitations, thereby preserving the plaintiff's cause of action. The holding strongly implies that the plaintiff's cause of action based on a violation of Section 7 was properly brought, an implication fortified by the Court's explicit recognition that the plaintiff would have a greater burden of proof on its Sherman Act claims than on its Clayton Section 7 claim. 381 U.S. at 323-324.

Thus, as opposed to the picture painted in Petitioner's Brief, there is no lower court disagreement today with the proposition that a violation of Section 7 can serve as the basis for a private antitrust damage action. Such judicial unanimity was compelled not only by requirements of statutory construction, but also by the realization that allowing such actions would help to accomplish the very economic and societal goals which prompted the enactment of, and are embodied in, the antitrust laws of this country.

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[4]*Blaski v. Inland Steel Company* (7th Cir. 1959), 271 F.2d 853; *Reibert v. Atlantic Richfield Company* (10th Cir. 1973), 471 F.2d 727, *cert. den.* (1973), 411 U.S. 938, 93 S.Ct. 1900.

B. Private Actions for Damages Under Section 7 Strengthen Antitrust Enforcement and Provide the Only Effective Method of Undoing the Changes in Market Structure Which Follow Anti-Competitive Mergers.

It is axiomatic that one of the major purposes of the antitrust laws in general, and of Section 7 of the Clayton Act in particular, is to prevent undue concentrations of economic power.[5] The legislative history of the amendments to Section 7 of the Clayton Act makes it clear that fear of economic concentration was a major factor underlying the Congressional decision to arrest mergers while the trend to concentration was still in its incipiency. *Brown Shoe Co. v. United States* (1962), 370 U.S. 294 at 317.

Section 7 of the Clayton Act thus seeks to stop mergers which, if allowed to take place, might ripen into actual lessened competition or monopoly. If the deterrent effect of Section 7 itself, or enforcement actions thereunder, prevent potentially anti-competitive mergers, then no impact on the market occurs and, of course, there could be no private action for damages. When such a merger is consummated, however, and changes take place in the marketplace which would not otherwise have occurred, competitors can be hurt as a result and unless they are compensated, the structure of the market stands little chance of returning to its pre-acquisition posture.

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[5]*United States v. Trans-Missouri Freight Association* (1897), 166 U.S. 290, 323-324, 41 L.Ed. 1007, 1021, 1022; *Standard Oil Co. v. United States* (1911), 221 U.S. 1, 77-82, 55 L.Ed. 619, 652-654; *Brown Shoe Co. v. United States* (1962), 370 U.S. 294, 317-318, 8 L.Ed.2d 510, 531-532; *United States v. Von's Grocery Co.* (1966), 384 U.S. 270, 275, 16 L.Ed.2d 555, 559; *United States v. Aluminum Co. of America* (2nd Cir. 1945), 148 F.2d 416, 428-429.

For example, a merger which bestows upon the acquired company the advantages of wealth, powerful marketing resources, increased power with customers and suppliers, and an added ability to repel competitive efforts, presents—at least in an already oligopolistic industry—a danger to competition. See, *FTC v. Procter & Gamble Co.* (1967), 386 U.S. 568, 18 L.Ed.2d 303, 87 S.Ct. 1224. The infusion of such advantages into an already dominant company could easily, if allowed to persist, lead to a restraint of trade or actual monopoly. Long before any measurable restraint of trade actually occurs, or before a monopoly is achieved, competitors are impacted. The gain in market power caused by the illegal acquisition and, conversely, the weakening of competitors begins as soon as the changes brought about by the acquisition take effect. At this point, the judicial microscope might be unable to detect any "lessening" of competition, since bitter battles may be taking place in the marketplace as the smaller firms struggle to maintain themselves. Nevertheless, the tendency towards a lessening of competition is in fact taking place and damaging competitors—perhaps permanently. From any rational economic perspective, it is impossible to deny that mere divestiture, after the acquisition has been allowed to run its course for a period of time, will not unscramble the omelet, or restore the *status quo ante* to the market structure. To do that obviously requires the payment of damages to competitors who have actually been injured by the effects of the illegal acquisition.

The primary purpose of Section 7 is to preserve the market structure which existed in the absence of an illegal acquisition. As the Federal Trade Commission

stated in discussing the proper relief to be granted in the *Procter & Gamble/Clorox* case:

> "The anti-competitive effects of this acquisition are not enjoinable. They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry, and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of the acquisition."
>
> *The Procter & Gamble Co.*, 63 F.T.C. 1465, 1584.

When a competitor has been damaged by the effects of a consummated acquisition, restoration of the market structure demands that such competitor be allowed to recover its damages. Petitioner's suggestion that private recovery should never be allowed overlooks the fact that shifts in market power and the effects of market entrenchment do not disappear upon divestiture. Unless some remedial action is permitted, the effects upon competitors and the market remain.

What may appear in the short run to be increased competition can, in the long run, have anti-competitive effects. The Third Circuit, in the instant case, recognized this principle:

> "But to focus on short run beneficial effects on consumer prices is to disregard the disjunctive 'or tend to create a monopoly' clause in §7, and to confuse injury to the public with injury to competitors. *The public is not injured while a potential monopolist is vigorously competing to achieve monopoly power, though that injury may come later.* Competitors, on the other hand, are injured in their business or property in a short-run period of predatory competition." (Emphasis added) (Pet. App. 18a).

Almost ninety years ago, this Court recognized the validity of the same principle in a case invalidating an agreement between various railroad companies for the mutual maintenance of reasonable rates on freight traffic, *United States v. Trans-Missouri Freight Association, supra,* 166 U.S. 290, 41 L.Ed. 1007. In that case, the Court recognized that even agreements for lower prices could have adverse effects:

> "In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers . . . ." 166 U.S. at 324, 41 L.Ed. at 1022.

It can easily be demonstrated that, in the Section 7 context, an apparent "short-run gain" can result in long-term harm. Assume, for example, that a tremendously powerful firm acquired, in violation of Section 7, a company with a 15% share of market in an industry of many competitors of approximately equal size. The acquiring firm, using to good advantage its huge wealth and power, improves the market share of the acquired company to 50% with corresponding declines in the shares of its competitors. If no competitor is actually forced out of business, the acquiror will undoubtedly argue that competition has not been "lessened", but it is unquestionably true that the diminished strength of the previously equal competitors will be an operative fact in the marketplace, and so long as the advantages gained by the now dominant

company remain, competition is in danger. Divestiture by itself will not restore the market structure which existed before the acquisition. The only remedy that has any hope of practical success is to also allow the injured competitors to recover the actual damages which resulted from the unlawful intrusion of the acquiring company's power into the marketplace. It hardly seems unfair that competitors be allowed compensation for their injury when an illegal acquisition has taken place, which has had a demonstrable adverse effect upon them. As stated by this Court, recovery should be allowed where "the injury alleged . . . was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause." *Zenith Corp. v. Hazeltine* (1969), 395 U.S. 100 at 125.

Finally, it is important to remember that this Court's often stated conclusion that private damage actions are one of the most effective deterrents to antitrust violations is especially applicable to Section 7. Preventing any possibility of private recovery would encourage the violation of Section 7 with impunity. The only remedy facing a defendant would be potential divestiture after years of legal action and, in the meantime, that defendant could apply its power to the marketplace, reap profits, and injure competitors with no fear that in the end there would be any piper to pay. The injured competitor's private right of action for damages suffered as a result of an illegal acquisition serves to increase the deterrent effect of Section 7, thus promoting effective antitrust policy.

II

A Section 7 Plaintiff Must, as With All Antitrust Plaintiffs, Prove Violation, Impact, and Amount of Damage.

Petitioner, in discussing what requirements are to be met before recovery is allowed to a Section 7 plaintiff, argues strenuously that actual lessening of competition (presumably amounting to restraint of trade) or monopoly must be shown before any recovery can be had. In short, Petitioner seeks to have this Court go beyond traditional antitrust analysis under which recovery is allowed when a plaintiff proves a violation of the antitrust laws which produces an adverse impact on his business or property and shows the dollar amount of damage attributable to such impact. Indeed, it would seem that Petitioner is arguing that before a recovery is possible for a Section 7 violation, the plaintiff must prove conduct which would also constitute a violation of Section 1 or 2 of the Sherman Act. The following analysis demonstrates that there is no legal basis for Petitioner's position, and its adoption would make Section 7 damage actions redundant, since other independent antitrust violations, in addition to the violation of Section 7, would always have to be proved before recovery would be possible.

It is at this point that the interrelationship of the two questions as to which the writ of certiorari was granted becomes most troublesome. The normal Section 7 case contains no contention that the acquired company was on the verge of extinction. To the extent that the posited disappearance of the acquired company in the absence of an acquisition is a crucial factor affecting the proper resolution of the instant case, it is a factor which should be considered as part

of the second question upon which certiorari was granted rather than the first. If the "failing company" defense in applicable in the instant case, then there is no violation of Section 7 at all. The standard for what a private plaintiff must prove in order to recover damages for a violation of Section 7 cannot be allowed to depend upon the existence of a fact (that the acquired company would have disappeared but for the acquisition) which fact in itself would eliminate the violation. The difficulty of properly formulating the correct standard for recovery under such unique circumstances as presented here is amply illustrated by Petitioner's argument on the first issue, in which Petitioner is wholly unable to ignore the overriding contention found in the instant case—and not in other cases—that the acquired firm would have disappeared absent the acquisition (Brief for Petitioner, pp. 30-31). The unique nature of the immediate dispute should not be permitted to distort the standards of recovery properly applicable to plaintiffs injured by a violation of Section 7.

A. No Legal Basis Exists for Imposing Different Requirements of Proof on Section 7 Plaintiffs Than Are Applicable Generally.

As has been noted previously, Section 4 of the Clayton Act is the basis for private actions brought for violations of the antitrust laws, including both the Sherman Act and the Clayton Act. The cases uniformly discuss private actions in terms of whether the requirements of Section 4 have been met. See, for example, *Hawaii v. Standard Oil Co.* (1972), 405 U.S. 251, 260-262, 31 L.Ed.2d 184, 191-193; *Zenith Corp. v. Hazeltine, supra,* 395 U.S. 100, 114 n. 9; *Hanover Shoe v. United Shoe Mach.* (1968), 392 U.S. 481, 488-489, 20 L.Ed.2d 1231, 1238-1239. Section 4 itself

establishes the elements which have been consistently applied in all antitrust cases. These elements are as follows: (1) injury to the plaintiff ("any person who shall be injured in his business or property"), (2) proximately caused by ("by reason of"), and (3) a violation of the antitrust laws ("anything forbidden in the antitrust laws . . . .").

As this Court said in *Radovich v. Nat. Football League* (1957), 352 U.S. 445, at 454, "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." Section 4 contains no qualification regarding its applicability to the various substantive provisions of the antitrust laws. To the contrary, the fact that it carries forward, in virtually identical language, the treble damage provisions of former Section 7 of the Sherman Act, and extends these provisions to Clayton Act violations, reinforces the conclusion that the basic elements of a plaintiff's cause of action are the same for Sherman Act and Clayton Act violations. Once the violation is shown, if a plaintiff in the target area can prove he was damaged by that violation, the right to recovery arises. As this Court has stated:

> "[T]o state a claim upon which relief can be granted . . ., allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."
>
> *Radiant Burners v. Peoples Gas Co.* (1961), 364 U.S. 656, 660.

The fact that Section 7 is a "tend to" statute does not change the general rule. For example, conduct

which has a "tendency" to create a monopoly may be actionable even though its actual results have not yet affected the economy adversely. If an offending practice has a "monopolistic tendency", then

> "[*I*]*t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.* Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly," ' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' [Citation omitted]" (Emphasis added).
>
> *Klor's v. Broadway-Hale Stores* (1959), 358 U.S. 207, 213-214.

These cases were summarized in a later comment by this Court to the effect that "we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public." *In Re McConnell* (1962), 370 U.S. 230 at 231.

No different result is reached in cases brought under the Clayton Act. Sections 2 and 3 of the Clayton Act, like Section 7, prohibit certain activities whose "effect . . . may be substantially to lessen competition or tend to create a monopoly . . . ." Like Section 7, Section 3 bans certain contracts (for example, requirements contracts) which are not inherently anti-competitive and are thus illegal only where the anti-competitive tendency is presented. *Tampa Electric Co. v. Nashville Co.* (1961), 365 U.S. 320, 327; *Brown Shoe Co. v.*

United States, supra, 370 U.S. at 330. The parallel nature of Sections 7, 2 and 3 has been expressly recognized by this Court:

> "Congress not only indicated that 'the tests of illegality [under § 7] are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act,' but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act, 15 U.S.C. § 14, ..."
>
> *Brown Shoe Co. v. United States,* 370 U.S. 294, 329.

Recently, in *Gulf Oil Corp. v. Copp Paving Co.* (1974), 419 U.S. 186, 42 L.Ed.2d 378, this Court again noted the similarity of Sections 3 and 7 of the Clayton Act:

> ". . . §§ 3 and 7 of the Clayton Act, . . . were intended to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate commerce. * * *"
>
> *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 201, 42 L.Ed.2d 378, 390.

We are aware of no case under Section 2 or 3 in which it has been held, or even contended, that a plaintiff must prove an actual lessening of competition or a monopoly before recovery of damages was allowed. The fact that all a plaintiff need prove to recover under Sections 2 and 3 is their violation and proximately resulting injury to his business or property is strong precedent for applying the same rule to actions brought for Section 7 violations.

B. The Third Circuit Was Correct in Not Requiring a Section 7 Plaintiff to Prove Actual Restraint of Trade or Monopoly as a Precondition to Recovery of Damages.

The Third Circuit, recognizing that to hold differently would in effect require a Section 7 plaintiff to prove a Sherman Act violation as a precondition to recovery, concluded that once a violation of Section 7 had been shown, the ordinary provisions of Section 4 applied. Petitioner's quarrel with the Circuit, while phrased in terms of what standard of recovery should be applicable, is in fact bottomed upon Petitioner's view that no violation of Section 7 occurred in the instant case. Petitioner argues that its rescuing of financially troubled bowling alleys prevented their elimination from the marketplace, and was truly pro-competitive. Upon such facts, Petitioner contends it would be unjust and contrary to the policy of the antitrust laws to allow Respondent a recovery. Implicit in all of Petitioner's arguments regarding what a Section 7 plaintiff must prove is the underlying assumption that the pro-competitive aspects of this acquisition (which arise exclusively out of the alleged fact that the acquired companies were "failing") should be sufficient to prevent any damage award against it. The rationale of the argument, however, is dependent not upon what standard should be applied for Section 7 recoveries, but whether there was in fact a violation of Section 7 in the first place. When the "failing company" issue is separated from the question of what standard of proof should be applicable to a Section 7 plaintiff, the Third Circuit's enunciation of the rule is consistent with prevailing antitrust doctrine and with the pronouncements of other courts. The Third Circuit in the instant case indicated that to have a recovery under Section 7, a private plaintiff must

prove a violation of the law, injury, and a causal relationship between the violation and the injury:

> "We hold, then, that a horizontal competitor of a company acquired by a deep pocket parent in violation of §7 can recover damages under §4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition. In this case there was sufficient evidence to go to the jury on the fact of such injury, although as we indicate hereafter there are difficulties with the manner in which the issue was framed in the court's charge." (Pet. App. 19a).

It should be noted that the Third Circuit, unlike Petitioner, correctly refers to the *violator's* presence in the market, this being the activity forbidden by Section 7. *Cf. United States v. du Pont & Co.* (1957), 353 U.S. 586, where this Court noted that Clayton Section 7 has the objective of preventing the evil results of an unlawful acquisition "which may be at or any time after the acquisition, depending upon the circumstances of the particular case." 353 U.S. at 597.

When the Third Circuit rejected Petitioner's plea to require Respondent to prove actual restraint of trade or monopoly, and instead opted for the traditional antitrust law standard, it was acting within the mainstream. The Third Circuit's approach is certainly not in "direct contradiction" to the views expressed by the Second Circuit in *Gottesman v. General Motors Corporation, supra,* 414 F.2d 956. That Court, after first discussing whether a treble damage action for a violation of Section 7 could be maintained (and in that context, making the statements quoted in Petitioner's Brief), very

carefully delineated the showing which the plaintiff would have to make on remand in order to recover:

> "Of course, plaintiffs cannot rest on a showing of a violation of section 7; they must, *as in private actions under other sections of the antitrust laws,* prove that they have been injured by the violation. However, the Supreme Court's finding that du Pont's stock ownership in General Motors constituted a 'potential' restraint of trade or monopolization hardly precludes a showing that a given party *was in fact injured by the prohibited acquisition, or that the section 7 violation proximately caused damage which might not in itself constitute a cause of action under the Sherman Act.* * * *" (Emphasis added).
>
> *Gottesman v. General Motors Corporation,* 414 F.2d 956, 961.

The Second Circuit concluded that the plaintiff in a Section 7 action must bear the same burden as do plaintiffs alleging violations of other sections of the antitrust laws. Specifically, the plaintiff must prove injury caused by "the violation", that is, injury caused "by the prohibited acquisition". There is nothing whatsoever in the *Gottesman* Opinion imposing any additional requirement on a private plaintiff.

Other Section 7 cases similarly apply the normal Section 4 elements in the Section 7 context. Thus, *Dailey v. Quality School Plan, Inc., supra,* 380 F.2d 484, 487-488, adopts the test of proximate cause used in cases alleging Sherman Act violations. Again, *Calnetics Corp. v. Volkswagen of America, Inc., supra,* CCH Trade Reg. Rep. ¶ 60,757, in reversing the trial court's dismissal on causation grounds of a treble dam-

age action based on a claimed violation of Section 7, held that the jury could find "at least some damages resulting from the acquisition" (p. 68,242). The court in *New Grant-Patten Milk Co. v. Happy Valley Farms, Inc.* (E.D.Tenn. 1963), 222 F.Supp. 319, 320, also applied the normal antitrust standards to a Section 7 claim. In the same manner, the court in *Zenith Vinyl Fabrics Corp. v. Ford Motor Company* (E.D. Mich. 1973), 357 F.Supp. 133, 137, applied the usual standards of causation. ("This requirement of proof of a causal connection applies to violations of Sections 1 and 2 of the Sherman Act as well as violations of Section 7 of the Clayton Act.")

On pages 27 through 29 of its Brief, Petitioner argues that "numerous" Section 7 cases have recognized that a private plaintiff must show "an actual lessening of competition or a monopoly." Petitioner conveys the impression that this is what the cited cases held by the use of material removed from its proper context. In fact, not a single one of the ten cases relied upon actually supports the proposition. Several of the cited cases involve parties who were held not to have the requisite standing to bring a private action, or as it is often phrased, not to be within the "target area" of the violation, and the others hinge not upon the standard of recovery to be applied but upon individual questions of causation and proof.[6]

The cases cited by Petitioner do demonstrate, however, that applying normal standards to Section 7 plaintiffs in no way will result in a flood of unjustifiable windfall recoveries. Initially, of course, a plaintiff will only be entitled to recover if an actual violation of Section 7 is proved. Thus, a case in which the acquisi-

[6]For the Court's convenience, a comprehensive discussion of these ten cases is attached hereto as Appendix A.

tion tends to bring about an increase of competition will be excluded from recovery at the outset. Next, a plaintiff will have to prove that his injury was in fact caused by the violation of the law. Moreover, the damages will have to be "proximate", which will presumably bar recovery for occurrences not reasonably foreseeable at the time of the violation. On the other hand, damages resulting from market entrenchment or from the "deep pocket" capabilities of the acquiring company, where such matters were foreseeable and formed a part of the rationale for holding the acquisition to be unlawful, would be recoverable. In addition, the plaintiff will have to satisfy the court that he is in the "target area" and has proper standing to complain of the violation. Thus, the existing rules are quite sufficient to assure that a defendant will not be a "guarantor" of its competitor's business. A competitor will have to establish a violation and will have to satisfy the rules of proximate cause and standing. It is neither necessary nor proper, under the requirements of Section 4 of the Clayton Act, to require that he prove more.

CONCLUSION.

The issue to which this Brief is addressed—what must a Section 7 plaintiff prove to recover damages under Section 4 of the Clayton Act—is made extremely difficult to analyze by virtue of the fact that the question accepted for review in effect incorporates the failing company defense. It assumes that any damages suffered were due to the mere continued presence of the acquired company in the industry and that, but for the acquisition, the presence of that company would have been eliminated. Traditional analysis teaches that the acquisition of a failing company does not violate Section 7. If the acquisition here is not in violation of the

law, it certainly could not provide the basis for the recovery of damages. Thus, if the second question accepted for review is answered in the affirmative, and this Court holds that the "failing company" defense has been established, there has been no violation of Section 7, and the question of what must be proved to recover damages becomes purely hypothetical. On the other hand, if no "failing company" defense is made out, and it is held that the acquired companies would have remained in the industry in any event, the first question becomes irrelevant as its factual premise will be incorrect. Under such facts, the "mere continued presence" in the industry of the acquired companies would not be a result of the acquisition.

Given such a factual matrix, it is easy to lose sight of the fact that the policy of the antitrust laws in general, and Section 7 in particular, is to prevent undue concentration of economic power. When an acquisition with no "failing company" justification is made in violation of Section 7, this preventative purpose of the law has been frustrated. Changes brought about by such an acquisition can cause an industry to become more concentrated and cause injury to competitors. Damages attributable to these actual results should be compensable. The goal of preventing undue concentration can best be attained by allowing plaintiffs within the "target area", who can prove that they suffered actual injury proximately caused by a violation of Section 7, to recover those damages.

Respectfully submitted,

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APPENDIX A.

The ten cases cited by Petitioner on pages 27 through 29 of its Brief are put forth as supporting the proposition that the lower courts have recognized that a private plaintiff must show actual restraint of trade or monopoly before a recovery can be had for a violation of Section 7. Read in context, the cases do not support the proposition, and there is no conflict between these cases and those which in fact recognize that a private plaintiff in a Section 7 case is to be treated in the same manner as any other antitrust plaintiff. As was pointed out previously, the cases relied upon by Petitioner in most instances involve not the question of what must be proved before recovery will be allowed, but, rather, the issue of whether the plaintiff was in the "target area" of the violation.

Seven of the cited cases involved parties who were held not to have the requisite standing to bring a private action. Taking these cases in the order of citation, the first is *Peterson v. Borden Co.* (7th Cir. 1931), 50 F.2d 644. The material quoted in Petitioner's Brief relates solely to the court's holding that a shareholder was not a person injured "by reason of" a violation of the antitrust laws. The court's reasoning was that lessened competition or monopoly would not hurt a shareholder. The case says nothing as to what a proper plaintiff would have to prove once he had demonstrated a violation of Section 7.

In *GAF Corporation v. Circle Floor Co., Inc.* (2nd Cir. 1972), 463 F.2d 752, the plaintiff was the target company in a takeover bid. The court held that the plaintiff could not state a cause of action under either Sections 1 and 2 of the Sherman Act or Section

7 of the Clayton Act since any harm brought on by the acquisition would be felt by competitors. Thus, the non-competitor plaintiff could not state a claim for damages to *its* business by reason of the violations. In short, it was not "injured by reason of" violations of the law. The case certainly does not purport to impose a restriction on Section 7 plaintiffs not equally applicable to all other plaintiffs. Rather, it stands for the proposition that a plaintiff in any antitrust case must show that the violation injured his competitive position. It is in this context that the material quoted in Petitioner's Brief appears. 463 F.2d at 757-759.

In *Reibert v. Atlantic Richfield Company* (10th Cir. 1973), 471 F.2d 727, the defendant was granted summary judgment on both the Sherman Act and Clayton Act claims brought by an employee of the company defendant had acquired. The court held that the employee had no standing and was not injured "by reason of" the alleged violations. As with the other cases cited by Petitioner, the quoted material occurs in the context of a discussion of the plaintiff's lack of standing to bring an antitrust action. It has nothing whatsoever to do with the question of what a plaintiff with standing would have to prove in order to establish his right to recovery.

In *Rayco Manufacturing Company v. Dunn* (N.D.Ill. 1964), 234 F.Supp. 593, a manufacturer was granted summary judgment on a counterclaim brought by a franchise dealer which alleged violations of Sections 3 and 7 of the Clayton Act and Section 1 of the Sherman Act. The material quoted by Petitioner appears in the following context:

> "Under Section 7 of the Clayton Act, a civil suit may lie upon a showing that (1) the acquisition did or reasonably might substantially lessen competition or create a monopoly, and (2) the complainant suffered some special damage to his business as a direct and proximate result of the acquisition. [Citations omitted] It is not enough that counterclaimant has suffered injury as a result of extraneous actions, such as Rayco's termination of the franchise on account of competitive purchasing. Rather, the injury must result from the lessened competition or monopoly itself. [Citations omitted]

> "Counterclaimant Dunn at no point in the voluminous pleadings is able to offer evidence showing this required proximate injury. A competitor of an acquiring or acquired corporation might have standing to bring such an action . . . ."
>
> Rayco Manufacturing Co. v. Dunn, 234 F. Supp. 593, 597.

Clearly the comments about "lessened competition" or "monopoly" were not intended to impose an additional requirement upon proper plaintiffs, such as a competitor, but were (in common with all of this line of cases) an explanation of why a party in the position of a terminated dealer was not within the scope of Section 4 of the Clayton Act.

The case of *Pandola v. Texaco, Inc.* (C.D.Cal. 1975), 1975—Trade Cas. ¶ 60,232, concerns a terminated dealer who was held to have suffered no injury to his business or property within the meaning of Section 4. The material quoted in Petitioner's Brief appears within the following context:

> "In order to be within the 'target area' of an alleged violation of Section 7 of the Clayton

> Act, and thus have standing to sue, a private litigant must demonstrate not only that its injury is causally related to the challenged acquisition, but also that its claimed injury results directly from the specific anticompetitive consequences proscribed by Section 7 itself, *i.e.*, 'lessened competition or monopoly itself.' "
>
> Pandola v. Texaco, Inc., 1975—Trade Cas. at 65,931.

It is obvious that the reference to "anticompetitive consequences" is expressly linked to the question of the "target area" of the violation. It is somewhat misleading to, as Petitioner did, quote the second half of the sentence as if it applied to a plaintiff admittedly within the "target area".

Zenith Vinyl Fabrics Corp. v. Ford Motor Company (E.D.Mich. 1973), 357 F.Supp. 133 involves a terminated distributor who was held not to have standing under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The court nowhere states that a Section 7 plaintiff must prove actual restraint of trade or monopoly, but in fact discusses the plaintiff's action in terms of decisions rendered under Section 4 relating to all substantive antitrust violations. The court clearly equated the causal showing required under a Sherman Act claim with that of a Clayton Act claim, stating:

> "This requirement of proof of a causal connection applies to violations of Sections 1 and 2 of the Sherman Act as well as violations of Section 7 of the Clayton Act."
>
> Zenith Vinyl Fabrics Corp. v. Ford Motor Company, 357 F.Supp. 133, 137.

Kirihara v. Bendix Corporation (D.Haw. 1969), 306 F.Supp. 72, denied recovery to a terminated distributor. Again, the plaintiff's action was unsuccessful because he was not deemed to be within the "target area" of the acquisition. 306 F.Supp. at 88-90.

Many of the seven cases just discussed, as well as Petitioner's Brief, cite the case of *Conference of Studio Unions v. Loew's Inc.* (9th Cir. 1951), 193 F.2d 51, *cert. den.* (1952), 342 U.S. 919. That case contains the statement that: "Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." 193 F.2d at 55. Factually, the case involved an action by an association of labor unions, and individual members of those unions, seeking recovery for alleged Sherman Act violations. The language just quoted appears in the context of the court's holding that the plaintiffs were not "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's Inc.* is, when viewed in context, a standing case, not concerned with the elements which must be proven in order to make out a claim for an antitrust violation. The fact that many of the Section 7 cases using similar language in a similar context cite it as authority simply strengthens the conclusion that their concern, too, was with concepts of standing, "target area", and incidental damage, and not with delineating elements of proof which a suitable plaintiff (such as a competitor) would have to satisfy.

Another of the cases cited by Petitioner, *Peltier v. Humble Oil & Refining Co.* (D.Ore. 1972), 1973-

1 Trade Cas. ¶ 74,278, also involves a terminated distributorship, but under circumstances in which the court did view him as being in effect a competitor and within the target area. While the defendant contended that the plaintiff, in order to recover for an alleged Section 7 violation, would have to show actual lessening of competition (*Id.* at 93,301), the court disagreed and took the position that if the defendant's antitrust violation forced the plaintiff out of business, the plaintiff could recover regardless of whether his injury or elimination from the business had an adverse impact on competition.

> "Defendant's position is since competition among distributors in the three-county area is healthy, plaintiffs are foreclosed from showing illegality. * * *
>
> "[Plaintiff] does not contest defendant's factual showing that his elimination had no effect on competition. However, a person may suffer legal damage, regardless of his own impact on competitive conditions, if it is an illegal suppression of competition which forces him out of the market. In *Klor's v. Broadway-Hale Stores* [1959 Trade Cases ¶69,316], 395 U.S. 207 (1959), the Supreme Court rejected the argument that defendants were immunized from suit under Sections 1 and 2 of the Sherman Act simply because the target of their illegal action was a relatively insignificant competitor among several hundred others.
>
> * * * *
>
> "If that acquisition was illegal under Section 7 because of its effect on competition in the three-county area, then he was injured because of something forbidden by the antitrust laws."
>
> Peltier v. Humble Oil & Refining Co., 1973-1 Trade Cas. at 93,301-93,303.

Petitioner cites one case involving a competitor. But that case, *Dole Valve Company v. Perfection Bar Equipment, Inc.* (N.D.Ill. 1970), 311 F.Supp. 459, similarly fails to support Petitioner's contention that Section 7 plaintiffs have a burden not placed on other antitrust plaintiffs. A reading of *Dole Valve* makes it clear that the plaintiff lost that case simply because it failed to prove causation:

> "This evidence, even when viewed in the light most favorable to the defendant, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), fails to show any causal connection between the acquisition and Perfection's injury. At best, the Klett affidavit shows only that K-Way made eight sales for which Perfection was competing. There is a total absence of evidence that the acquisition was in any way responsible for these lost sales."
>
> Dole Valve Company v. Perfection Bar Equipment, Inc., 311 F.Supp. 459, 462.

The material quoted by Petitioner then follows.

The final case cited by Petitioner, *Smith-Victor Corporation v. Sylvania Electric Products, Inc.* (N.D.Ill. 1965), 242 F.Supp. 315, 320, dismissed a complaint alleging that Section 7 had been violated, where the complaint merely alleged an acquisition and a lessening of competition, without alleging that the lessening of competition resulted from the acquisition. In short, the plaintiff in that case did not properly allege a

violation of Section 7. The case says nothing as to what is required of a plaintiff once a violation of Section 7 is established.

It is clear that the line of authority presented by the Petitioner does *not* establish that "the 'injury' that must be shown in order to recover is injury flowing from . . . an actual lessening of competition or a monopoly." Rather, it is apparent that insofar as the courts have addressed the standard of recovery required under Section 4 of a private plaintiff, they have simply required him to meet the same standard of proof normally required, namely a showing that the violation proximately caused injury to the plaintiff in his business or property.